

**The Electric Group, Inc. and Local 683, International
Brotherhood of Electrical Workers, AFL-CIO.**
Case 9-CA-35791

January 29, 1999

DECISION AND ORDER

**BY CHAIRMAN TRUESDALE AND MEMBERS
HURTGEN AND BRAME**

On October 9, 1998, Administrative Law Judge Wallace H. Nations issued the attached decision. The General Counsel filed limited exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The Electric Group, Inc., Ashville, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(a) and reletter the subsequent paragraphs.

"(a) Telling job applicants that they will not be hired because of their affiliation with or membership in a union."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives
of their own choice

¹ The judge found that the Respondent violated Sec. 8(a)(1) of the Act by telling applicant Jerry Baughn that it would not hire him because of his union membership. (ALJD fn. 6) However, the judge did not mention this violation in his Conclusions of Law or in his recommended Order and Notice. The General Counsel has excepted to these omissions. We correct the judge's apparent inadvertent omissions by amending the Conclusions of Law to include this violation, and by modifying the recommended Order and substituting a new Notice accordingly.

To act together for other mutual aid or protection
To choose not to engage in any of these protected
concerted activities.

WE WILL NOT tell job applicants that they will not be hired because of their affiliation with or membership in a union.

WE WILL NOT fail or refuse to hire job applicants because of their affiliation with or membership in a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer immediate employment to Jerry Baughn as an electrician.

WE WILL make Jerry Baughn whole for any loss of earnings and other benefits resulting from our unlawful refusal to hire him, less any net earnings, plus interest.

THE ELECTRIC GROUP, INC.

Theresa Donnelly, Esq., of Cincinnati, Ohio, for the General Counsel.

Rayford T. Blankenship, Esq. and *Jonathan P. Sturgill, Esq.*, of Greenwood, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on August 26, 1998. The charge was filed by Local 683, International Brotherhood of Electrical Workers, AFL-CIO (the Union) on March 13, 1998,¹ and the complaint was issued on May 19. The complaint alleges that The Electric Group, Inc. (Respondent) refused to hire an electrician, Jerry Baughn, because of his union affiliation.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Electric Group, Inc., a corporation, is an electrical contractor with a facility in Ashville, Ohio. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

*A. The Facts Surrounding Respondent's Refusal to Hire
Jerry Baughn*

The Respondent is a nonunion electrical contractor. The alleged discriminatee, Jerry Baughn, is a journeyman wireman who has been a member of the International Brotherhood of Electrical Workers, Local 1516, an Arkansas local, since August 1994. Baughn testified that in January of this year, he moved to Ohio. Being unemployed, he sought work through the Ohio State Unemployment Agency where he learned Respondent was seeking to employ electricians.

¹ All dates are in 1998 unless otherwise indicated.

On February 2, Baughn filed an application and resume for an electrician position with Respondent. Baughn submitted the application and resume, along with a note he attached, to Respondent's secretary. The secretary told Baughn "that they were looking for electricians" and suggested he call later when the Respondent's managers, Master Electrician David Bowens or Estimator James Montgomery, would be in the office.

Following her suggestion, later that afternoon, Baughn called Respondent and spoke to Montgomery. Montgomery told Baughn that he had not yet reviewed his application and resume. Baughn called again approximately 1 hour later and spoke to Montgomery. Baughn asked if Montgomery had reviewed his application. Montgomery said he had, and noted that Baughn was a card carrying member of the IBEW. Baughn conceded that he was a union member. Montgomery then told Baughn that "he had a friend that was set up that way, and he wasn't going to jeopardize his company like that. He wouldn't hire union."

The next morning, February 3, Baughn called Ernie Williams, an organizer for the Union. He told Williams about the conversation he had with Montgomery the previous day. They concluded that Respondent had acted in a discriminatory manner but that without a tape of Montgomery's statements there was little that Williams, or the Union, could do. They agreed that Baughn would call Montgomery again, ask about the test attached to the application and record the conversation.

That afternoon, Baughn called Montgomery and taped the conversation using his answering machine. He asked Montgomery how he did on the test portion of the application and whether it was good enough to be an electrician for Respondent. Montgomery replied, "[I]t don't have anything to do with whether you would be a good enough electrician to work for our company or not, we don't hire union. I am absolutely afraid of what it might entail and lead into because I've already got letters from the union hall that they are going to be watching and all this other garbage and I'm—I'm just not going to jeopardize our company that way."²

Respondent never interviewed or hired Baughn. However, Respondent did hire Joseph Creech, who filed an application on March 12; Neil Clark, who applied on March 31; Jared McKinney, who applied on April 3; Bryan Carter, who applied on April 3; Randall Schneider, who applied on April 28; and John Bentley II, who applied April 28.³ It continued to hire throughout the time between Baughn's application and the date of this hearing.

B. Discussion and Conclusions⁴

The General Counsel has made a strong prima facie case of unlawfully motivated discrimination against Baughn under the

Board's *Wright Line* analysis.⁵ Animus against union membership is demonstrated without question in Montgomery's statements to Baughn on February 2 ("he wasn't going to jeopardize his company like that. He wouldn't hire union.") and on February 3 ("[I]t don't have anything to do with whether you would be a good enough electrician to work for our company or not, we don't hire union."). I cannot imagine a more clear indication of union animus than stating to a job applicant that the company refuses to consider hiring him solely because of his union membership. These statements also clearly show that Respondent was aware of Baughn's union membership. They also clearly show that the only reason given Baughn for Respondent's refusal to hire him or even interview him was Baughn's union membership, a reason that is clearly unlawful under the Act.⁶ No part of the General Counsel's prima facie case requires a credibility determination as Montgomery admitted making the statement's attributed to him. To the extent that any credibility resolutions are required in this record, I credit Baughn over Respondent's witnesses.

That there were electrician positions for which Baughn could have been hired is certain. During direct examination by Respondent's counsel, Montgomery, was asked if there was an opening for an electrician position at the time Baughn filed an application. Montgomery answered, "Yeah, we can always use another electrician. We're like the Marine Corps." In fact, as noted above, after it refused to hire Baughn, Respondent hired several electricians, whose applications show no union affiliation.

Under *Wright Line*, once the General Counsel has made a prima facie case, the Respondent has the burden of proving that it would have taken the same action in the absence of unlawful motivation. When considering the reasons advanced by Respondent, one must keep in mind that none of these reasons played any part in the decision not to hire Baughn. They are after the fact justifications, which Respondent has managed to find in preparation for this proceeding. The defenses presented by Respondent are shifting and inconsistent, strongly supporting a finding that no legitimate reason existed for not hiring Baughn. *Frances House, Inc.*, 322 NLRB 516, 523 (1996).

The first reason advanced by Respondent in defense of its actions perhaps show best how disingenuous is Respondent's position. Montgomery first testified that Respondent, in its advertisement with the Ohio Unemployment Agency, was looking for a supervisor, someone who could "run a project" for Respondent.⁷ Thus viewing Baughn's application as one for a supervisory position, Montgomery testified that Baughn's application did not reflect enough experience to hold such a position.

Montgomery then shifted his testimony to assert that Baughn was applying for a supervisor's position and Respondent did not have such a position available at the time.⁸ This spurious reason is not based on any documented fact of record. Montgomery clearly testified that the advertisement for job applicants placed with the Ohio Unemployment Agency was for the

² Respondent received a letter from the Union dated September 24, 1997. This letter notes that Respondent was the low bidder on a named project and goes on to state that the Union was going to monitor Respondent on this job to make sure it complied with various laws.

³ Respondent initially stipulated that it hired all of these individuals as electricians. Montgomery, however, later testified that Creech, who only had a year's experience and had limited ability with reading blueprints, was hired as a supervisor and that Bentley II, is a helper although the Respondent's document lists him as an electrician.

⁴ Baughn's resume notes Baughn's union affiliation and he attached a note to his application informing Respondent that he was a union member. He wrote: "I am presently a member of IBEW but I am willing to work non-union." On the application form itself, Baughn listed his Arkansas union local as his most recent employer.

⁵ See *Wright Line*, 251 NLRB 1083 (1980).

⁶ Montgomery's statements in and of themselves violate Sec. 8(a)(1) of the Act. *Quality Control Electric, Inc.*, 323 NLRB 238 (1997).

⁷ Montgomery was unable to supply the ad itself or even the text of the ad. Montgomery never directly testified that the ad said anything about supervisory experience, stretching the years of experience called for in the ad to mean that it was looking for a supervisor.

⁸ Respondent hired Joseph Creech as a supervisor in March.

position of "electrician."⁹ Baughn credibly testified that he was applying for the position of electrician and his application on its face reflects that. Nothing was said in the conversations between Baughn and Montgomery which would indicate that Montgomery thought he was filing for a supervisor's position and clearly nothing said by Montgomery would indicate that this had anything to do with Respondent's refusal to hire.

The application form included a short test covering an applicant's knowledge of certain electrical symbols and other aspects of residential and commercial electrical work. Though Montgomery clearly stated to Baughn on February 3 that his performance on the test did not matter, at hearing Respondent relied as its second line of defense on Baughn's mistakes on the residential test and his failure to even take the commercial test. With regard to his mistakes, Baughn testified that without the code book, he was unable to answer a couple of the symbol questions. He also testified that he simply did not notice the commercial test. I credit this testimony. If that were a serious matter, Montgomery could have pointed it out to Baughn in his conversation with Baughn on February 3, and let Baughn respond or complete the test. He did neither and I find this reason to be pretextual.

Further support for this finding can be found in the documentation of the electricians Respondent did hire after refusing to hire Baughn. For example, Respondent hired Eugene Douglas who failed to respond to any of the questions on the second page of the residential test. Respondent hired Joseph Creech, as a supervisor, although he failed to identify three symbols on the first page of the residential test. Respondent hired Daniel Powell, who did not respond to any of the symbol questions, and only attempted to answer one question on the second page of the residential test, and hired Michael Reed, who also failed to answer a significant portion of the test.¹⁰ The Respondent next contended that based on its reading of Baughn's application, it would not have hired him because he lacked sufficient commercial experience. Baughn's application reflects he had 3.5 years of industrial electrical experience at the time he filed the application.¹¹ Baughn and Williams testified that industrial work is generally more complicated than commercial work. Consequently, a more qualified and experienced electrician is needed to perform industrial electric work. Indeed, Montgomery conceded that industrial work is harder than commercial work and, more importantly, testified that he assumes that if an electrician is able to perform industrial work then he is able to perform commercial work. Furthermore, Respondent hired Clark, Creech, and Carter, who had significantly less electrical experience than Baughn.

On brief Respondent argues, without merit, that they had no reason to believe that Baughn was sympathetic to the Union, then it argues that they rightly refused to hire him because if the Union found that he was working nonunion, it might threaten to fine him and he would quit. The justification for this reason is that he would be a short time employee. This reason is still based entirely on Baughn's affiliation with the Union and is unlawful. Similarly, it argues that Baughn had just moved to Ohio and might want to return to his wife and family who re-

mained in Arkansas. This latter fact was not known to Respondent until the hearing herein.¹²

The explanations Respondent provided at hearing for refusing to hire Baughn are clearly pretextual. Respondent was motivated by the singular reason Montgomery gave to Baughn; that is, "we don't hire union." I find that Respondent's discriminatorily motivated refusal to hire Baughn violates Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to hire and consider for hire Jerry Baughn because of his union affiliation and membership, Respondent has engaged in conduct in violation of Section 8(a)(1) and (3) of the Act.

4. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily refused to hire Jerry Baughn, it must offer him employment as an electrician and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of refusal, February 3, 1998, to date of proper offer of employment, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, The Electric Group, Inc., Ashville, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire job applicants because of their affiliation with and/or membership in a union.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jerry Baughn employment as an electrician.

¹² Though the Respondent's primary witness was Montgomery, it put in testimony by Master Electrician David Bowens which reiterated the reasons Montgomery advanced to demonstrate that Respondent would not have hired Baughn under any circumstances. Bowen however, had nothing to do with the decision not to hire Baughn and Montgomery had complete authority to hire on his own, without need to consult Bowen. Thus, I find Bowen's testimony immaterial.

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁹ See Tr. 78, LL. 13-15.

¹⁰ On brief, Respondent argues that it overlooked the failure of these job applicants to complete their applications because they had worked previously for Respondent. However, only Douglas was shown to have fallen in this category.

¹¹ Baughn also holds an Arkansas State Master Electrical license.

(b) Make Jerry Baughn whole for any loss of earnings or other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Ashville, Ohio, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 13, 1998.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.